

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WILLIE JAMES LEWIS,

Defendant-Appellee.

UNPUBLISHED

March 15, 2005

No. 251635

Oakland Circuit Court

LC No. 2000-173274-FH

Before: Murray, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

Defendant pled guilty to possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), and was sentenced as a third habitual offender, MCL 769.11, to 5 to 40 years in prison. The prosecutor appeals the sentence by leave granted. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

On May 6, 2000, when defendant committed this offense, it carried a mandatory minimum sentence of ten years. MCL 333.7401(2)(a)(iii). However, the statute allowed a court to depart from the statutory minimum term of imprisonment if it found “substantial and compelling reasons to do so.” MCL 333.7401(4). Substantial and compelling reasons justifying a departure “should ‘keenly’ or ‘irresistibly’ grab our attention, and we should recognize them as being ‘of considerable worth’ in deciding the length of a sentence.” *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). “[O]nly objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum term of years imposed by the Legislature for certain drug offenses.” *People v Daniel*, 462 Mich 1, 6; 609 NW2d 557 (2000). Appropriate objective factors include “(1) whether there are mitigating circumstances surrounding the offense, (2) whether the defendant has a prior record, (3) the defendant’s age, (4) the defendant’s work history, and (5) factors that arise after the defendant’s arrest such as the defendant’s cooperation with law enforcement officials.” *People v Johnson (On Remand)*, 223 Mich App 170, 173; 566 NW2d 28 (1997).

In this case, the trial court primarily relied on defendant’s age, work record, productivity as a citizen, familial support during the proceedings, and cooperation with police and the court. While the trial court may have erred when it relied on thin evidence that the crime was “escalated” for sentencing and that a drug dealer intimidated defendant into refusing to cooperate with police, the court gave these findings only cursory treatment. Therefore, we are persuaded that the trial court would have handed down the same sentence based solely on the other

substantial and compelling reasons for departure. *People v Babcock*, 469 Mich 247, 260, 273; 666 NW2d 231 (2003).

The trial court's determination regarding the existence of a reason or factor warranting departure is a factual determination that is reviewed on appeal under the clearly erroneous standard. The determination that a particular factor is objective and verifiable is reviewed by this Court as a matter of law. The trial court's determination that objective and verifiable factors present a substantial and compelling reason to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.* at 273-274.

The trial court did not err when it listed defendant's familial support during the proceedings as a factor worthy of consideration. A family's provision of support to a defendant during trial proceedings is evident to a judge who can see them gather in the courtroom. Their presence is an objective fact that the trial court can easily verify by scanning the gallery and making minimal inquiry. Family support was considered a substantial and compelling reason for departure in *People v Harvey*, 203 Mich App 445, 448; 513 NW2d 185 (1994), and our Supreme Court pointed to that case as one that correctly applied the "substantial and compelling" criteria. *Fields, supra* at 78-79. Therefore, the trial court properly considered defendant's family history as one of the factors that, taken together, provided the trial court with a substantial and compelling reason to depart.

The court did not clearly err in finding that defendant's age, work history, and minimal prior record were also objective and verifiable factors worthy of consideration. Defendant was thirty-five years old and had only two old convictions: one for carrying a concealed weapon and another related one for going AWOL from a halfway house. Since his release back into society, defendant obtained employment with an automaker and rose to the position of a union steward. He provided financially for his own children as well as those of his ex-wife. Factors of this kind are also typically considered substantial and compelling. *Id.* at 78.

Finally, the trial court did not clearly err when it found that defendant cooperated with police after his arrest. Cooperation with police is always a valid consideration, and defendant's assistance led to a conviction. *Id.* at 77. Considering all of these valid factors together, the trial court did not abuse its discretion when it found them substantial and compelling and sentenced defendant to a five-year minimum rather than the ten-year minimum set forth in the statute.¹

Affirmed.

/s/ Jane E. Markey

/s/ Peter D. O'Connell

¹ We note that the Legislature recently amended the statute and eliminated the mandatory minimum for defendant's offense. MCL 333.7401(2)(a)(iii), as amended. While unnecessary in this case, it strikes us that such a clear and radical change in our state's public policy could, in itself, provide a sentencing court with a substantial and compelling reason for departing from the old mandatory minimum.